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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM AND MARY LOU CASTORR, Petitioners,

v.

JOHN M. BRUNDAGE, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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July 8, 1982

QUESTIONS PRESENTED

1. Is there federal court habeas corpus jurisdiction for a parent who brings an action pursuant to 28 U.S.C. Section 2241 et seq. after termination of parental rights?

2. Does the res judicata principle bar petitioners' civil rights claims under 42 U.S.C. Section 1983 when those claims could have been brought in state court but were not actually litigated in state court?

3. Is it proper to dismiss all claims against state officials because of judicial and Eleventh Amendment immunity when the complaint seeks injunctive and declaratory relief and names such respondents in their individual and official capacities?

NAMES OF THE PARTIES*

WILLIAM and MARY LOU CASTORR, Petitioners,

v.

JOHN M. BRUNDAGE, judge of Probate of Calhoun County, Michigan; CALHOUN COUNTY PROBATE COURT; MICHIGAN DEPARTMENT OF SOCIAL SERVICES; PATRICK ANDERSEN, individually and as an employee for the Michigan Department of Social Services; LEONARD and GLORIA SHUMATE, individually and as foster parents for the Michigan Department of Social Services, Respondents.

*The only party to these proceedings whose name is not on the caption of the case is Donald Wayne Castorr, who is the child of petitioners William and Mary Lou Castorr.

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No. _____

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners William and Mary Lou Castorr respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 23, 1982.

OPINION BELOW

The opinion of the Court of Appeals is reported at 674 F. 2d 531. The District Court opinion, which was affirmed by the Sixth Circuit, is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 23, 1982. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Section 2254(a).

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judg-

ment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

United States Code, Title 42:

Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Eleventh Amendment:

The Judicial power of the United

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

Donald Wayne Castorr is the youngest of six natural children of petitioners William and Mary Lou Castorr. In September of 1975, Donald was placed in temporary foster care by the State Probate Court. In February of 1976, Donald was made a temporary ward of the Probate Court. After hearings which took place in February and March of 1977, the parental rights of the petitioners to their son Donald were terminated by the Probate Court on June 22, 1977. Appeals were taken from this ruling to the State Circuit Court and the Michigan Court of Appeals; and both Courts

affirmed the action of the Probate Court in terminating parental rights. The petitioners then applied to the Michigan Supreme Court for leave to appeal, which is discretionary and which was denied on December 21, 1979. As part of that application for leave, the petitioners asserted, for the first time, that the Michigan statute relating to termination of parental rights was unconstitutional.

On March 7, 1980, petitioners, seeking compensatory, declaratory and injunctive relief, filed suit in the District Court for the Western District of Michigan against the Probate Court, the Probate Judge, the foster parents, the state Department of Social Services and an employee of that Department. In that complaint, the petitioners challenged the constitutionality of the statutory scheme under which their parental rights had been

terminated, as well as challenging on due process grounds certain procedures used in the parental termination process. The complaint alleged that the respondents were liable individually and in their official capacities. Petitioners sought habeas corpus relief, pursuant to 28 U.S.C. Section 2241 et seq., and damages and injunctive and declaratory relief, all pursuant to 42 U.S.C. Section 1983.

All respondents filed Motions to Dismiss pursuant to F.R.C.P. 12(b)(6). The September 3, 1981 opinion of the District Court Judge granted the respondents' Motion, thereby dismissing the complaint. An appeal was promptly taken and the Sixth Circuit Court of Appeals, in its opinion of March 23, 1982, affirmed the District Court's dismissal on the following grounds (pages 2 and 3 of slip opinion):

1. Petitioners' claim for habeas

corpus relief is judicially inappropriate;

2. The claims based on civil rights statutes are barred by res judicata;

3. Judicial immunity bars petitioners' claim for damages against the state judge; and

4. Petitioners' claim for damages against the Michigan Department of Social Services is barred by the Eleventh Amendment.

The Sixth Circuit Court of Appeals opinion did not address the questions of whether the dismissal was appropriate when declaratory and injunctive relief was sought against state officials as well as compensatory relief or whether the dismissal was appropriate against the respondents, who were sued in their individual and official capacities, in their individual capacities.

REASONS FOR GRANTING THE WRIT

1. THE INTRIGUING HABEAS CORPUS JURISDICTIONAL FACTUAL BASIS IN THIS CASE APPEARS TO BE MORE APPROPRIATE FOR THE EXERCISE OF JURISDICTION THAN IN THE CASE OF LEHMAN v. LYCOMING COUNTY CHILDREN'S SERVICES AGENCY; AND THIS COURT GRANTED CERTIORARI ON OCTOBER 6, 1981, IN THAT CASE.

In this case, as in Lehman v. Lycoming County Children's Services Agency, 648 F. 2d 135 (3rd Cir. 1981) (en banc), cert. granted, 50 U.S.L.W. 3244 (Oct. 6, 1981) (No. 80-2177), the parents, whose parental rights have been terminated, are attempting to assert, on behalf of themselves and on behalf of the minor child who has been taken from them, a habeas corpus claim pursuant to 28 U.S.C. Section 2241 et seq.

The arguments made in the Lehman

case are equally applicable in the present case. This case should be heard with Lehman. This Court has never opted to rule on the propriety, or lack thereof, of habeas corpus relief in the parental termination context. Petitioners strongly urge that the most rational and persuasive position is for allowing habeas corpus relief in this situation. As pointed out in Jones v. Cunningham, 371 U.S. 236, 238-39 (1963), habeas has seen a considerably expanded usage, and it was noted in that case that under English common law, habeas could be employed in custody disputes between warring parents. See Ronald Sokol, Federal Habeas Corpus, Section 6.1, at 73 (2d Ed. 1969).

The Castorr child certainly appears to fall within the literal language of the habeas statute, in that, in the words of that statute, he is "in custody pursuant to the judgment of a State court...in vio-

lation of the Constitution," and "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. Section 2254(a) and (b). And, since it is clear that petitioners have exhausted state remedies by appealing up to the highest court in the state, the only real question is that of custody. Judge Rosenn, in his dissenting opinion in Lehman, supra, noted that, in his mind, the state supervisory control over the children was sufficient to meet the custody requirement in the federal habeas statute. This conclusion seems appropriate in that the child was being held solely at the behest of the state, as is the Castorr child. In support of that conclusion, Judge Rosenn pointed out at page 162:

> ...[h]ow can one plausibly declare that the removal of a child by the State from his natural family and the nonconsensual termination for

> all time of the reciprocal relationship between mother and child impinges less on personal liberty than the call to active duty of an inactive reservist who had not yet reported for service, Hammond v. Lenfest, 398 F 2d 705 (2nd Cir. 1968), or that it constitutes less of an impingement on liberty than experienced by an accused released on his own recognizance, Hensley v. Municipal Court, 411 U.S. 345 (1973).

See also Jones v. Cunningham, supra at 242, where this Court found one on parole to be "in custody" for habeas purposes.

In a parental termination situation, it is the state which is depriving an individual of fundamental personal liberties and in that sense it is not too unlike a criminal prosecution. See Moore v. Sims, 442 U.S. 415, 423 (1979), in which the Court said that the "temporary removal of a child in a child abuse context is...in aid of and closely related to criminal statutes." And, as Judge Rosenn pointed out at page 163 of Lehman:

This is a proceeding in which the State itself has taken temporary custody of the children after utilizing its own judicial machinery to terminate, permanently and in all respects, the legal relationship of the children and their natural mother. Thus, this is not merely a dispute over which of the children's natural parents should raise them but whether the State may constitutionally forever foreclose the children from any relationship whatsoever with their natural parent. The important social and psychological consequences of this distinction cannot be overemphasized. The total extinction of a familial relationship between children and their biological parents is the most drastic measure that a state can impose, short of criminal sanctions, to protect disadvantaged or neglected children. The termination of the mother's rights in her children is, in effect, a declaration to the children that their mother is legally dead. Therefore, any suggestion that the exercise of jurisdiction in this case will lead to the exercise of jurisdiction in ordinary child custody disputes between natural parents is disingenuous and palpably unrealistic.

This case is more appropriate for habeas relief than either Lehman, supra, or Sylvander v. Home for Little Wanderers, 584 F. 2d 1103 (1st Cir. 1978). In both of those cases, the complaining parents had voluntarily relinquished their children to private homes in the first instance. Furthermore, as Judge Rosenn noted at 158 in Lehman, Sylvander should not have been relied on by the four judges responsible for the plurality opinion in Lehman because "Sylvander concerned custody of a private adoption agency and did not involve state action." In the present case, the parents took no voluntary action to facilitate parental termination, and the "state action" is apparent in that the Draconian action of the state was the sole basis for the child's removal from the parents. This case is even more suitable for habeas jurisdictional relief than Leh-

man, the case in which certiorari has been granted.

2. THE RES JUDICATA DECISION BELOW IS ONE MORE EXAMPLE OF THE SERIOUS SPLITS AMONG THE CIRCUITS ON THIS ISSUE; AND THIS COURT DESPERATELY NEEDS TO RESOLVE THE ISSUE OF WHETHER CONSTITUTIONAL CLAIMS NOT ACTUALLY LITIGATED IN EARLIER STATE COURT PROCEEDINGS ARE BARRED IN A SUBSEQUENT FEDERAL SUIT.

In analyzing the res judicata issue, it is first important to determine whether the due process issues and the void for vagueness issues, which are the substance of the Section 1983 claims, were actually raised in the state court system. It is clear that these issues were not raised in the Calhoun County Probate Court, the Calhoun County Circuit Court or in the Michigan Court of Appeals. However, the petitioners did attempt to raise the unconstitutionality of the parental termination statute for the first time when they

sought leave to appeal to the Michigan Supreme Court. But, the Michigan Supreme Court denied that leave to appeal; and consequently, those issues, although petitioners tried to bring them before the state court system at the highest level, were not actually litigated or argued in the state court system.

This case must be considered as one where the constitutional claims were not actually raised and litigated in earlier state court proceedings but could have been raised. The circuits are severely split on the question of whether to apply the res judicata doctrine to Section 1983 federal court claims where the constitutional claims could have been but were not raised in an earlier state court proceeding.

Whereas the First, Ninth and Tenth Circuits appear to support the Sixth Circuit res judicata ruling in this case--

see, e.g., Gallagher v. Frye, 631 F. 2d 127 (9th Cir. 1980); Scoggin v. Schrunk, 522 F. 2d 436 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Spence v. Latting, 512 F. 2d 93 (10th Cir.), cert. denied, 423 U.S. 896 (1975); and Lovely v. Laliberte, 498 F. 2d 1961 (1st Cir.), cert. denied, 419 U.S. 1038 (1974)--the Second and Third Circuits clearly hold that a litigant is not precluded from later asserting 1983 claims in federal court when he could have raised them in a prior state court proceeding but did not. See, e.g., New Jersey Educ. Ass'n. v. Burke, 579 F. 2d 764 (3rd Cir.), cert. denied, 439 U.S. 894 (1978); Lombard v. Board of Educ., 562 F. 2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975); and Graves v. Olgiati, 550 F. 2d 1327 (2d Cir. 1977).

Four other circuits have mixed and differing feelings. In the Seventh

Circuit, compare Kurek v. Pleasure Driveway & Park Dist., 557 F. 2d 580 (7th Cir. 1977), with Blankner v. City of Chicago, 504 F. 2d 1037 (7th Cir. 1974), cert. denied, 421 U.S. 948 (1975). In the Eighth Circuit, complare Alsager v. District Court, 518 F. 2d 1160 (8th Cir. 1975), and Alsager v. District Court, 545 F. 2d 1137 (8th Cir. 1976), with Robbins v. District Court, 592 F. 2d 1015 (8th Cir. 1979). In the Fifth Circuit, compare Mack v. Florida State Bd. of Dentistry, 430 F. 2d 862 (5th Cir.), cert. denied, 401 U.S. 960 (1971), with Jennings v. Caddo Parish School Bd., 531 F. 2d 1331 (5th Cir. 1976). The Sixth Circuit, despite the decision in this case, is also one of the so-called confused circuits, in that Getty v. Reed, 547 F. 2d 971 (6th Cir. 1977) seems to conflict directly with the opinion in this case and Coogan v. Cin-

cinnati Bar Ass'n, 431 F. 2d 1209 (6th Cir. 1970).

Recently the Court, in Allen v. McCurry, 449 U.S. 90, 97 n. 10 (1980) noted the split in the circuits on this issue and explicitly reserved its opinion as to the resolution of the conflict. There has been no decision on this question, although the Court did recently entertain constitutional challenges to state custody procedures under Section 1983, without any indication that the failure to give the state courts an opportunity to consider the federal constitutional questions was a bar to federal jurisdiction. See Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977). The time for the resolution of this issue is now. An ostrichlike approach on this critical res judicata question is inappropriate.

3. TO LEAVE THE LOWER COURT OPINIONS STANDING ON THE QUESTION OF ELEVENTH AMENDMENT AND JUDICIAL IMMUNITY AS TO EITHER PERSONS SUED IN THEIR INDIVIDUAL CAPACITIES OR AS TO CLAIMS FOR DECLARATORY AND EQUITABLE RELIEF IS CONTRARY TO NUMEROUS DECISIONS OF THIS COURT.

In this case, petitioners filed suit against the probate court, the state Department of Social Services, the judge of the probate court and an employee of the Department of Social Services and these claims were for injunctive and declaratory relief, as well as for damages. Relief was sought against the individual respondents in their individual and official capacities.

While it is absolutely clear that retrospective compensatory relief is barred by the Court's recent interpretations of the Eleventh Amendment (except,

of course, as to relief sought against the individuals in their individual rather than official capacities), it is clearly erroneous to reach the same conclusions, as did the lower courts, as to declaratory and injunctive relief. This is the teaching of Edelman v. Jordan, 415 U.S. 651 (1974) and Quern v. Jordan, 440 U.S. 332 (1979). While it is axiomatic that those decisions prohibit any claim for retrospective monetary relief against the state and state officials, it is equally clear from those decisions that declaratory and injunctive relief, as well as a prospective monetary award, is clearly not prohibited against the state and state officials by the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123 (1908), as well as the interpretations of that decision in Edelman and Quern. Consequently, the lower court opinions

as to Eleventh Amendment immunity are in direct conflict with the latest Eleventh Amendment enunciations of this Court.

The ruling dismissing the claims against the individuals in their individual capacities is also erroneous and not compelled in any way by the Eleventh Amendment or Supreme Court interpretations of that Amendment. The Eleventh Amendment does not bar an action for damages against an official sued in his individual capacity. See Quern, supra, as well as Spicer v. Hilton, 618 F. 2d 232 (3rd Cir. 1980).

In Stump v. Sparkman, 435 U.S. 349 (1978), and Pierson v. Ray, 386 U.S. 547 (1967), the Court made it clear that judges are immune from liability for damages. However, judges are not immune from injunctive relief against them, and the injunctive relief contemplated

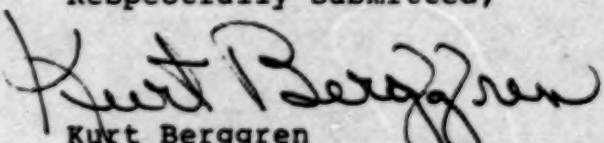
in this case against Judge Brundage is certainly not the type of injunctive relief that from time to time has been held to be improper because it interferes with judicial discretion. The District Court judge erroneously interpreted the injunctive relief sought in this case as being mandatory in the sense of impinging on a state judges's discretionary functions. However, a declaration of unconstitutionality by the federal court would not in any way interfere with the discretionary functions of the state probate court judge. If such a declaration were made as to the constitutional challenges in this case, such declaration and such injunctive relief would merely enjoin the probate judge's powers pursuant to an unconstitutional statute and/or unconstitutional procedure. Discretion would remain untarnished. This is clearly not

the type of case that was contemplated when the judicial immunity doctrine was tentatively and carefully extended to the injunctive relief area by case law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,



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